92-1776

Supreme Court, U.S.
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No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MOSSIE JOHNSON, Petitioner

v.

DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and
ROSE'S STORES, INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

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APRIL 30, 1993

QUESTION PRESENTED

1. Can a State Court Clerk's failure to preform a ministerial duty amount to a deprivation of an individual's rights under the Fourteenth Amendment's guarantees of due process and equal protection of the law?

LIST OF PARTIES

The parties in the proceedings below were the petitioner, Mossie Johnson and the respondents David Lynch, D\B\A\ Forrest Hills Shopping Center, and Rose's Stores Inc., C.T. Corporation System.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

MOSSIE JOHNSON, Petitioner,
v.
DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and ROSES STORES, INC., Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

The petitioner, Mossie Johnson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Commonwealth of Kentucky, entered in the above entitled proceeding, July 31, 1992, and finalized by a denial of discretionary review, February 10, 1993.

OPINIONS BELOW

The Order of the Whitley County, Kentucky Circuit Court dismissing the petitioner's cause was not published, but a copy is

attached in the appendix hereto, p. 1a infra.

The Opinion of the Court of Appeals of Kentucky affirming the lower Court, was not available for publication, but a reprint is attached in the appendix hereto, p. 4a, infra.

The subsequent Denial of Discretionary Review of petitioner's cause by the Supreme Court of Kentucky was likewise unpublished, and the reprint of that order is attached in the appendix hereto, p. 11a, infra.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Kentucky Court of Appeals is invoked under 28 U.S.C. § 1257. This cause became a final judgment of the Commonwealth of Kentucky when the Kentucky Supreme Court denied discretionary review of the Federal issue, which was raised during the Civil Appeal Prehearing statement, as required by Kentucky law.

STATUTES INVOLVED

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title right or privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

UNITED STATES CONSTITUTION, Amendment Fourteen (14).

Section One (1). Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Mossie Johnson, was seriously injured when she fell over a concrete abutment on the premises of respondent's business. Petitioner obtained counsel, who proceeded to file suit in the Commonwealth of Kentucky, in the County where the accident occurred. Kentucky has a one year statute of limitations applicable to personal injury claims. Petitioner's claim was filed three days before the limitation period expired. In Kentucky, however, the limitation period is not satisfied until the Clerk of the Court where suit has been filed issues a summons. The Clerk did not issue a summons in petitioner's cause until four days after the complaint was filed, which resulted in the dismissal of petitioner's claim as time barred.

The time in which Kentucky chooses to satisfy its limitation

of actions period is not at issue. The procedure may have its flaws, but the issue requiring this Court's attention relates to the due process deprivation caused by the Clerk who failed to administer her duty. Petitioner was deprived of a recognized property right when the clerk delayed the issuance of the summons, and prevented petitioner from prosecuting her claim.

The Federal constitutional issue was first raised by the petitioner at the initial appellate level. In petitioner's Civil Prehearing Statement filed with the Kentucky Court of Appeals, the petitioner first claimed that the dismissal of her action violated her rights to due process and equal protection under the Fourteenth Amendment. A copy of this Prehearing Statement is attached in the appendix hereto at p. 12a, infra.

REASONS FOR GRANTING THE WRIT

I.

The judgment of the Kentucky Court of Appeals violates petitioner's rights under the due process

clause of the Fourteenth Amendment.

The Kentucky Constitution affirms the common law right of access to the courts in cases of personal injury. Ky. Const. § 14. It is well recognized in Federal Law that such a state created right is a property right protected under the 5th and 14th Amendments to the U.S. Constitution. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320; 70 S. Ct. 652, 660 (1950); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428; 102 S. Ct. 1148, 1154 (1982). This Court has held that an individual entitlement, grounded in state law, cannot be removed except for cause and with the protection of "due process". Logan, 102 S. Ct. at 1155. Thus, the issue to be resolved in petitioner's cause is whether by arbitrarily denying her claim, the Clerk of the Whitley County Kentucky Circuit Court deprived her of her rights of due process.

The procedure to initiate a civil law suit in Kentucky is recognized as one that both allows the injured party sufficient time to make a complaint and protects those accused of tortious conduct from stale claims. However, the system can break down, and, as in petitioner's cause, a meritorious claim can be dismissed due to events

be yond the control of the parties. Petitioner's cause was dismissed due to the failure of a Court Clerk to act, which resulted in a due process deprivation.

The petitioner does not complain that the procedure of initiating suit in Kentucky is invalid. The contention is that in her specific situation, the procedure has randomly deprived her of a recognized property right without due process of law.

In Logan, the Court began its opinion by stating: "The issue in this case is whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure. . .," supra, 102 S. Ct. at 1151. The Court held that the state system had destroyed the complainant's property interest, thereby denying him due process. Id. at 1158.

In this case, the petitioner's cause of action was terminated because the Court Clerk failed to comply with the procedures mandated by Ky. Rev. Stat. § 413.250 and Ky. R. Civ. P. Rule 3. In both Logan and in this case, the inaction which caused the deprivation was a state agent's failure to perform a ministerial duty

according to State procedure. In both cases it was the implementation and application of a subsequent state procedure that deprived the parties of their rights to a hearing on the merits of their cause of action. In Logan, this Court decided that the state system destroyed the complainant's property interest in a right of action. As the facts and results are parallel, the outcome, under the reasoning of Logan should be the same: a hearing on the merits of the case.

The Kentucky Court of Appeals found the petitioner's action distinct from the holding in Logan. They opined that in petitioner's case, counsel for the complainant is charged with knowing that a summons must be issued in order to validly commence an action. True, counsel may be charged with knowing the limitations of actions requirements, but nowhere in the law of Kentucky is an attorney given the power or authority to compel the issuance of a summons. Like the claimant in Logan, once the petitioner filed her claim, she was at the mercy of a state official. When this state official failed to administer her duty, the result was a deprivation of the petitioner's rights under the Due Process Clause of the Fourteenth Amendment.

Therefore, the Kentucky Court of Appeals was incorrect in

stating that the issues presented by petitioners actions were distinguishable from those in decided in Logan. In furtherance of its mistaken opinion, that Court relied on language in Logan which declared that a state may enact reasonable procedural requirements for triggering the right to adjudication; i.e., statutes of limitations, and such requirements would not result in due process deprivations. Petitioner agrees with this principle. However, when a state official charged with carrying out these reasonable procedures fails to do so, and the failure results in the loss of a property right, a due process violation occurs.

II.

The judgment of the Kentucky Court of Appeals violates the petitioner's rights under Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause means, at the very least, that legislation must classify the persons it affects in a manner rationally related to legitimate governmental objectives. Logan 102 S. Ct. at 1159. Neither Ky. Rev. Stat. § 413.250 nor Ky. R. Civ. P. Rule 3,

as applied to petitioner's case, meet this minimum definition.

Certainly, the Commonwealth has a legitimate governmental interest in requiring the timely disposition of personal injury claims, and it achieves that result in a rational manner through its limitation period, embodied in Ky. Rev. Stat. § 413.140. But, § 413.140 and Ky. R. Civ. P. Rule 3, acting together, and, as applied here, effectively bar an action if a state actor, the Court Clerk, fails to fulfill her duty. Justice Powell could have been talking about petitioner's cause when he wrote,

> The decision of the Illinois Supreme Court effectively created two classes of claimant: those whose claims were, and those whose claims were not, processed within the prescribed 120 days by the Illinois Fair Employment Practices Commission . . . The state no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end - or indeed any other - in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so . . . this Court has held repeatedly that state-created classifications must bear a rational relationship to governmental objectives . . [T]he challenged statute, as construed and applied in this case, failed to comport with this minimal standard. Logan, 102 S Ct. at 1162, (Powell, J. concurring).

Since the petitioner possesses no power to issue process and no

power to compel the clerk to issue process, it is unfair and irrational to punish her for the Court Clerk's negligent behavior.

When the applicable state provisions are construed and applied against the petitioner as they were in her cause against respondent, the random and arbitrary actions of the Clerk put her cause in the "have not" classification. This random classification by the Clerk has no legitimate governmental purpose, and has denied petitioner equal protection of the laws.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The Kentucky Court of Appeals has rendered a judgment which is in direct conflict with prior valid decisional law of this Court. Petitioner requests this petition be granted, and this Court grant relief as appropriate.

Respectfully Submitted,

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APRIL 30, 1993

APPENDIX

COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
CIVIL ACTION NO. 90-CI-510

MOSSIE JOHNSON

Plaintiff,

vs.

DENNIS LYNCH d/b/a
FOREST HILLS SHOPPING CENTER
and ROSE'S STORE, INC.

Defendants.

ORDER

Upon motion of the Defendant Roses Stores, Inc. to dismiss and upon motion of Defendant Dennis Lynch, d/b/a Forest Hills Shopping Center for Summary Judgement, and the Court having heard counsel, considered the record and being in all respects sufficiently advised;

IT IS HEREBY ORDERED that the Complaint of the Plaintiff herein be and is dismissed on the grounds that the Complaint was not

timely filed within the applicable statute of limitations set forth in KRS 413.140 and KRS 413.250.

This case shall now be stricken from this Courts docket with prejudice.

This the 11th day of March, 1991.

_____

JUDGE, WHITLEY CIRCUIT COURT

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GWB 3-13-91
CLERK'S INITIALS DATE

PAC/shp
34/39

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 91-CA-681-MR

MOSSIE JOHNSON

Appellant,

vs.

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER; and ROSE'S STORES, INC.

Appellee.

AFFIRMING

BEFORE: GUDGEL, HOWERTON, and WILHOIT, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Whitley Circuit Court dismissing appellant's action because it was not timely filed. Appellant contends that the court's order of dismissal violated her rights under the Kentucky Constitution and the United States constitution. We decline to review appellant's first contention regarding the Kentucky Constitution because this issue was not raised in her prehearing statement. CR 76.03(6);[1] Howard

v. Magoffin County, Ky. App., 734 S.W. 2d 499 (1987); Karam v. Greentree Corp., Ky. App., 783 S.W.2d 78 (1990). We disagree with appellant's second contention. Hence, we affirm.

Appellant Mossie Johnson was injured on September 13, 1989, when she fell on a concrete barrier at appellee Rose's Store in Corbin, Kentucky. On September 10, 1990, she filed a tort action against Rose's and against appellee David Lynch, d/b/a Forest Hills Shopping Center. However, summonses on the complaint were not issued by the clerk until September 14, 1990, appellees filed motions to dismiss arguing that the action was not timely filed because the first summons issued on the complaint was not issued before the applicable limitations period expired. The court granted the motions. This appeal followed.

Civil Rule 3 provides that a civil action is commenced by the filing of a complaint and the issuance of a summons. KRS 413.250 provides that an action shall be deemed to commence on date of the first summons. Pursuant to CR 3 and KRS 413.250, therefore, appellant's action must be deemed to have been commenced on September 14, 1990, the date on which the first summons was

issued. This was one day after the one-year statute of limitations, provided for in KRS 413.140, for filing a personal injury action had run. It is well established that failure to have a summons issued within the statutory limitations period is fatal to a cause of action. Casey v. Newport Rolling Mills Co., 156 Ky. 623, 161 S.W. 528 (1913); Simpson v. Antrobus, 260 Ky. 641, 86 S.W.2d 544 (1935); Delong v. Delong, Ky., 335 S.W.2d 895 (1960).

Appellant seeks to avoid this rule, however, arguing that the failure to issue the summons in the instant action was due to the clerk's failure to issue it "forthwith," or immediately, upon the filing of appellant's complaint as clerks are directed to do by CR 4.01 and KRS 30A.140. Appellant does not argue that the procedure for initiating a civil law suit in Kentucky is constitutionally invalid. Instead, she maintains that dismissing her cause of action because of the clerk's failure to immediately issue a summons, which appellant argues was beyond her power to do or to compel the clerk to do, resulted in her federal rights to due process and equal protection of the laws being violated. We disagree.

Appellant relies on the Supreme Court's decision in Logan v.

Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) to support her argument. The issue in Logan was whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily-mandated procedure. Although the appellant in Logan timely filed his charge with the Illinois Fair Employment Practices Commission, the Commission failed to conduct a conference within the statutorily-mandated time. The Commission denied appellee's motion to dismiss the charge because the conference was not held within the statutory period. However, on appeal, the Illinois Supreme Court held that the Commission's failure to timely conduct a conference deprived the Commission of jurisdiction to hear the charge. The U.S. Supreme Court reversed, holding that appellant was deprived of a protected property interest in violation of the due process clause of the Fourteenth Amendment because the state's interest in refusing his procedural request was outweighed by his private interest and the length or finality of the deprivation.

Justice Blackman, in a separate opinion, joined by Justices

Brennan, Marshall and O'Connor, concluded that the Illinois statute also violated Logan's right to equal protection of the laws because the statute, as interpreted and applied by the Illinois Supreme Court, created tow categories of claims without a rational basis for doing so.

The instant action, however, is distinguishable from Logan. Here, appellant's counsel is charged with knowing that a summons must be issued in order to validly commence an action. Although the summons must be issued by the clerk, there was no evidence adduced at the hearing on the motion to dismiss showing that appellant's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that appellant's counsel checked with the clerk to make sure that a summons had been issued. As the Supreme Court stated in Logan, the state may enact reasonable procedural requirements for triggering the right to an adjudication; i.e., statutes of limitations or, in appropriate cases, filing fees without violating the due process rights of claimants. Therefore, whether the actions of the Whitley Circuit Clerk were intentional or negligent, they did not violate appellant's due process and equal protection rights under the federal constitution.

However, as appellee points out, appellant is not without a remedy for the clerk's action, or inaction in this situation. Section 103 of the Kentucky Constitution requires that clerks give such bond as prescribed by law. KRS 30A.030 requires that all clerks shall be bonded for the faithful performance of their duties. In the case of Commonwealth, to Use of Green v. Johnson, 123 Ky. 437, 96 S.W. 801, 802 (1906), our highest court held that clerks are liable for errors committed in their ministerial functions unless they can show that the errors occurred in spite of the use of reasonable care and diligence. Moreover, a clerk is liable in damages for the negligent and careless act of his deputy. Id. See also Jeffers v. Taylor, 178 Ky. 392, 198 S.W. 1160 (1917).

The court's order is affirmed.
ALL CONCUR.

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SUPREME COURT OF KENTUCKY
92-SC-690-D

MOSSIE JOHNSON

Movant,

vs. 91-CA-681-MR
WHITLEY CIRCUIT COURT
90-CI-510

DENNIS LYNCH, d/b/a
FOREST HILLS SHOPPING CENTER
and ROSE'S STORE, INC.

Respondents.

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: February 10, 1993.

Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY

CIVIL APPEAL PREHEARING STATEMENT
(CR 76.14)

Mossie Johnson

Appellant,

v. Court of Appeals Docket
No. 91 CA 681

Dennis Lynch d/b/a Forrest Hills Shopping Center and Rose's Stores, Inc.

Appellee.

APPEAL FROM Whitley CIRCUIT COURT-ACTION NO. 90-CI-510
TRIAL JUDGE: Jerry Winchester
DATE JUDGEMENT/ORDER APPEALED FROM ENTERED March 13, 1991
DATE NOTICE OF APPEAL FILED March 25, 1991 NOTICE OF CROSS APPEAL COUNSEL Mossie Johnson (APPEALANT)

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1. Has this case been before an Appellate Court previously No
If so when and identify_____
2. **Type of litigation** (e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.)
** **Attach a copy of the complaint** ** Premises liability

3. **Circuit Court Disposition** (type of order; e.g., Default or Summary Judgment, Dismissal, etc.) **(Attach a copy of any written opinion by trial court.)** Order of Dismissal

4. **Relief:**
(a) Damages: Unspecified
Amount Sought $_____
Amount Granted $_____
(b) Injunction: ()Granted ()Denied
(c) Other: 10a

5. **Facts and issues:** (Brief statement of tacts, claims, defenses and issues litigated) (Attach a separate sheet if necessary.) The plaintiff was injured on September 13, 1989. The clerk issued the summons on September 14, 1990. The trial court, pursuant to defendants' motions dismissed the complaint as barred by the applicable statute of limitations set forth in KRS 413.140 and KRS 413.250.

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.) Whether dismissal of the action violated the plaintiff's rights to due process and equal protection under the United States Constitution.
7. Will the appeal turn on an interpretation or application of a particular case or statute? Yes. If so, cite case or statute number. United States Constitution, Fourteenth Amendment.

8. Is there any known case involving substantially the same issue now pending before either appellate court of this state? No. If so, identify _____.

CERTIFICATION

I/We hereby certify that a copy of the foregoing statement was executed and a copy served on:

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_____

(Signature) (Date)

Name: David E. Waite

Address: 620 Market Street,
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The filing of a civil notice of appeal suspends the running of time for further steps in the appeal--see CR 76.14(13).